No. 381.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

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THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA TO THE USE OF LEWIS E. SMOOT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA TO REVIEW A JUDGMENT OF THAT COURT AFFIRMING A JUDGMENT OF THE SUPREME COURT OF THE DISTRICT.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

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Reply to Brief for Defendant in Error.

Defendant's brief is open to one of the objections to the 73d rule itself, viz., it substitutes the worst evidence for the best.

As evidence whether the rule is "inconsistent with the laws of the United States," the collection of State laws and decisions in that brief bears about the same relation to the best evidence upon that question as proof under the rule by *ex parte* affidavit of the written instruments in suit in this case bears to the "mode of proof" prescribed by the laws. What is consistent with the laws of the United States is to be decided by those laws and the decisions thereunder. De-

fendant's argument amounts to no more than this: the 73d rule is consistent with the laws of the United States because some other rule or statute, more or less like the 73d rule, is consistent with the constitution and laws of this or that State, which are, more or less, like the Federal Constitution and statutes—*ignotum per ignotius.*

"If it is law, it will be found in our books; if it is not to be found there, it is not law" (116 U.S., 627; Plaintiff's Brief, p. 42).

Defendant refers to no Federal statute or rule of a Federal court bearing the slightest resemblance to the 73d rule; he cites no case decided under the Federal laws or in a Federal court, except an unreported case in this court, in which no opinion was rendered, and several decisions of the court below.

He cites no case under any affidavit of defense system in which summary judgment was entered against defendant under circumstances like those in this case, viz., judgment against the surety on a bond with collateral conditions, who makes oath that he has no knowledge of the acts which the plaintiff alleges that he, the plaintiff, has performed, upon which he relies to forfeit the bond, to make the surety's conditional liability absolute, and to fix its amount. He omits to show what protection is provided, in the various affidavit of defense systems to which he refers, for a defendant sued under the circumstances of this case; but there is a *dictum* in one of the cited cases, 99 Mass., 404, 410, that under the statutory affidavit of defense system of Massachusetts an affidavit of defense like that in this case would be sufficient to prevent the summary judgment and to put the plaintiff to proof. And under the statutory system of Maryland, to which he refers, the summary judgment is only interlocutory (Maryland cases *infra*).

Under the Pennsylvania system, upon which the 73d rule is generally understood to have been modeled—

"*Bonds with collateral conditions are not within the spirit or principle of the affidavit of defense rule.* * * * *Instruments which are executory on the plaintiff's part, or which for any reason require averments supplemental to the copy filed, to complete the showing of defendant's liability, are without the affidavit of defense law.* * * * *Contracts under which the defendant's liability is in any manner conditional are outside the scope and legitimate intention of the affidavit of defense law.* * * * *If that rule means anything it means that the plaintiff's case as regards the defendant's liability, must rest upon the face of the copy, unaided by any extraneous averments*" ("Endlich on Affidavits of Defense," in the sections quoted on Plaintiff's Brief, pp. 44, 45, 46).

But defendant's brief makes clearer the methods by which the validity of the rule has been upheld.

The authority conferred upon the District supreme court to establish "rules of practice" is expressly limited to rules "*not inconsistent with the laws of the United States*" (District Code, 1902, sec. 65).

The rule is inconsistent with the laws, because it impairs defendant's right to "due process of law."

It impairs defendant's right to demand that the facts upon which he is sought to be charged be ascertained and determined by the modes provided by law before judgment be rendered against him, and authorizes entry of summary judgment against him without such ascertainment and determination of the facts necessary to sustain the judgment.

FIFTH AMENDMENT.

HOVEY *v.* ELLIOTT, 167 U. S., 409.

Judicial proceedings "*cannot be valid unless they proceed upon inquiry and render judgment only after trial*" (Hovey *v.* Elliott).

Under the rule there is no judicial ascertainment of the facts. They are ascertained, if ascertained at all, upon *ex parte* affidavit (as in this case), which is not a mode provided by law.

The rule is inconsistent with the laws, because it impairs defendant's right to "trial by jury", in cases within the Seventh Amendment and authorizes summary judgment against him in such cases without such trial.

Barney *v.* Schmeider, 9 Wall., 248.
Hodges *v.* Easton, 106 U. S., 408.
Baylis *v.* Ins. Co., 113 U. S., 316.
Capital Traction Co. *v.* Hof, 174 U. S., 1.
Plaintiff's Brief, pp. 7, 8, 9.

"Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer: *secondly, when the law is admitted by the parties, and the facts disputed; as in the case of judgment on a verdict:* thirdly, when both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by confession or default: or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *nonsuit* or *retraxit*" (3 Black. Com., 395).

Or, as expressed by this court in regard to judgments of the second sort: "*The form of the pleadings shows nothing and admits nothing. The plaintiff then must make a case by evidence to the jury*" (Barney *v.* Schmeider, *supra;* Plaintiff's Brief, p. 7).

Although in this case also the "form of the pleadings shows nothing and admits nothing," the plaintiff in the trial court had summary judgment entered in his favor without making a case "by evidence to the jury."

The rule is inconsistent with the laws, because it impairs defendant's right to the protection of the statutory "mode of proof," and authorizes the entry of summary judgment against him without such proof.

"The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided" (sec. 861 R. S. U. S.).

"Its purpose is clear to provide a mode of proof in trials at law *to the exclusion of all other modes of proof;* and because the rigidity of the rule may, in some cases, work a hardship, it makes exceptions of such cases as it recognizes to be entitled to another rule, and it provides that rule for those exceptions. *Every action at law in a court of the United States must be governed by the rule, or by the exceptions which the statute provides.* There is no place for exceptions made by State statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this. Not only is no such power conferred, but it is prohibited by the plain language and the equally plain purpose of the acts of Congress, and especially the chapter on evidence of the revision. The New York statute would, if in force, repeal or supersede the act of Congress" (*Ex parte* Fisk, *supra*; Plaintiff's Brief, p. 10; Union P. R'y v. Botsford, 141 U. S., 250; Plaintiff's Brief, p. 22).

113 U.S. 713.

This case also is an "action at law in a court of the United States," and should have been "governed by the rule or by the exceptions which the statute provides," but it was not so governed.

Under the rule the facts are proved, if proved at all, by *ex parte* affidavit (as in this case), which is not the "mode of proof" prescribed by law.

It is no valid answer to the assignments of error that the plaintiff in error was deprived of the protection of the constitutional form of trial and of the statutory mode of proof for defendant to say:

"It is hard to see what benefit a trial by jury would be to the defendant. If he cannot deny the justice of the plaintiff's demand in the affidavit, he would be no better off if he got before a jury. * * * It would only be necessary for the plaintiff to take the stand and repeat what he said in his affidavit in order to procure the verdict of the jury,

for the defendant admits that he cannot truthfully deny the plaintiff's statements" (Defendant's Brief, pp. 10, 12).

To such suggestions made in other cases this court has answered:

"It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is not a question before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury and to the benefit of such conclusions of fact as it might justifiably have drawn, a right he demanded and did not waive; and that he has been deprived of it, by the act of the court in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned" (Baylis *v.* Ins. Co., *supra*). Like answers to like suggestions are given in Barney *v.* Schmeider, and Hodges *v.* Easton, *supra* (Plaintiff's Brief, pp. 7, 8, 9).

The rule is inconsistent with the laws, because it impairs defendant's right to have the damages assessed in the manner provided by law, and authorizes the entry of summary judgment against him without such assessment of damages.

Section 961, Revised Statutes of the United States:

"In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, when the forfeiture, breach, or non-performance appears by default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity; *and when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury.*"

In a case from the District, covenant upon a charter-party containing covenants to be performed on both sides, to recover the hire of the vessel (a cause of action not differing in principle from that in this case), the law upon the subject of assessment of damages is thus laid down by this court:

"There is no issue properly joined. * * * The plea is certainly bad. * * * Suppose the plaintiff had demurred to this plea and the court had given judgment for him upon the demurrer; *a jury would have been necessary to assess the damages. The court could not have given judgment for the damages claimed in the declaration.* Nor would the plea be evidence upon which the jury could assess damages. * * * The plea being considered a nullity, the case would stand as if no plea had been put in, and *the plaintiffs would be bound to prove their cause of action.* Or if the plaintiffs, instead of going to trial, had treated the plea as no answer to the declaration and taken judgment as by *nil dicit, the damages must have been assessed by a jury, and the plaintiffs would have been bound to prove their cause of action.* * * * Had the cause been upon a bond"—the context shows that the court is referring to single bonds, and not bonds upon condition—"or other instrument for the payment of money, the instrument itself would show what was due. But this is an action of covenant sounding in damages, and such damages depend upon matters *de hors* the instrument declared on, and must be ascertained by proof *aliunde*" (Simonton *v.* Winter, 5 Pet., 149).

Under the rule the sum for which judgment is rendered "in any action arising *ex contractu*" is ascertained by the *ex parte* affidavit of the plaintiff, which is not the mode provided by law.

"The sum for which judgment should be rendered" is not made "certain" within the meaning of section 961, Revised Statutes of the United States, by plaintiff's *ex parte* affidavit.

Under the statutory affidavit of defense system of Maryland it has been held that the summary judgment is only interlocutory, and that the defendant could not be deprived of the right to have the damages assessed by jury consistently with the preservation of the right of trial by jury under the State constitution (Knickerbocker Ins. Co. *v.* Hoeske, 32 Md., 326; Cooper *v.* Roche, 36 Maryland, 566). The first case was an action on an insurance policy; the second for "broker's commission." In the former case the court of appeals of that State said:

"We think the court below erred in refusing the application of the defendant for a 'trial by jury of the question of the amount of damages to be assessed to the plaintiff.' The 9th section of the act of 1864 provides that 'when any judgment by default shall be entered under the preceding sections the court may assess the damages on proof thereof without empaneling a jury.' This section must be construed in subordination to the constitutional provision, article 15, section 6, which declares that 'the right of trial by jury of all issues of fact in civil proceedings in the several courts of law in this State, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved.' In the face of this provision the 9th section of the act of 1864 cannot be construed so as to deprive the defendant in this case of having the damages ascertained by a jury. In a proceeding under this act, where a defendant has not appeared in court and is in default, or having appeared waives or fails to ask to have this question referred to a jury, the court is empowered to assess damages. But the defendant in this case not having waived his constitutional rights was entitled to have the question of the amount of damages passed upon and decided by a jury" (32 Maryland, 326. So in 36 Maryland, 566).

The Maryland case cited by the court in Cropley *v.* Vogeler, 2 App. D. C., 34, in support of the rule does not touch the subject of the affidavit of defense system, and antedates the cases in 32 Md., 326, and 36 Md., 566, which do treat of that subject and which are directly opposed to the decision sustaining the 73d rule, under which the damages are assessed, if assessed at all, "in any action arising *ex contractu*" by the court upon the *ex parte* affidavit of the plaintiff, a mode of assessing damages unknown to the common law and not authorized by our statutes; and the other case also, Fullerton *v.* Bank, 1 Pet., 604, cited in support of the rule by the court in 2 App. D. C., 34, does not touch the subject of the affidavit of defense system (Plaintiff's Brief, p. 36).

The rule is inconsistent with the laws, because it exacts of defendant in actions at law discovery, in advance of trial, in cases in which he is not required by law to make dis-

covery, and authorizes the entry of summary judgment against him if he fail to make such discovery.

"*The only power of discovery or inspection conferred by Congress is to require the parties to produce books or writings* in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they may be compelled to produce the same by the ordinary rules of proceeding in chancery*, and to nonsuit or ~~default~~ a party failing default to comply with such an order (Rev. Stat., sec. 724). * * *

In *Ex parte* Fisk, (113 U. S.) just cited, the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the State had been removed into the circuit court of the United States. It was urged that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. But this court, speaking by Mr. Justice Miller, held that this was a matter of evidence, and governed by that section" (Union P. R'y *v.* Botsford, 141 U. S., 250; Boyd *v.* United States, 116 U. S., 616; National Cash Register Co. *v.* Leland, 94 Fed. Rep., 502; Plaintiff's Brief, pp. 21, 22, 23, 24; 3 Blacks. Com., p. 342; Plaintiff's Brief, p. 14).

The proceeding under the rule, as stated by the District supreme court (Plaintiff's Brief, p. 13), "rather resembles a bill of discovery in equity than a pleading at common law."

But prior to the adoption of the rule this court had said:

"The hybrid mixture of civil and common law pleadings and practice introduced by State codes cannot be transplanted into the courts of the United States" (24 How., 268).

"In the supreme court of the District of Columbia, as in the circuit courts of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law" (135 U. S., 314; Plaintiff's Brief, p. 24).

The rule inverts the rule of discovery laid down by this court:

"The rule to be applied to a bill seeking a discovery from an interested party is that the complainant shall charge in his bill that the facts are known to the defendant and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony" (10 Pet., 502; Plaintiff's Brief, p. 25).

In this case the rule exacted of defendant discovery of facts of which plaintiff has and defendant has not knowledge, and, upon failure to make such discovery, summary judgment was entered against him.

The rule is inconsistent with the laws, because it violates the rule requiring the best evidence and permits the contents of written instruments in suit to be proved by *ex parte* affidavit. It was so done in this case.

"The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence, raises a presumption that, if produced, it might not operate in his favor" (1 Pet., 596).

Defendant meets this objection by saying "profert of the contracts and bonds is made in both the declaration and affidavit" (~~Plaintiff's~~ Brief, p. 14). This is not a question of profert, which is matter of pleading; but even if it were, it would not avail defendant, for while he made profert of the bonds he made no profert of the contracts with the District. This is a question of *proof* of the terms of the instruments upon which plaintiff's right to recovery depended, and also a question of the construction of those terms. Whether the materials for which payment is claimed were embraced within the terms of the contracts with the District is not a question of fact to be established by plaintiff's *ex parte* affidavit, but a mixed question of

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law and fact, and the instruments should have been proved according to the rules of evidence, and the court should have construed their terms, and in their absence the court could not construe them. Plaintiff was not only allowed to prove the instruments by his *ex parte* affidavit, but he, and not the court, construed them.

That formal proof of the execution of instruments in suit is dispensed with unless denied under oath cannot authorize secondary evidence of their contents (Sebree *v.* Dorr, 9 Wheat., 563; Plaintiff's Brief, pp. 41, 47).

"If the rule (of court) attempted to interfere with or control the rules of evidence, it certainly could not be supported" (11 Wheat., 439; Plaintiff's Brief, p. 40).

The court below says:

"It does not appear that there was any formal written contract between the contractor and the plaintiff relating to the materials furnished by the latter, upon the necessary interpretation of which the liability in whole or in part depends" (Rec., p. 15).

But it does appear (from the allegations of the conditions in the bonds—Rec., pp. 2, 3) that the contracts between Vinson and the District, upon the interpretation of which the liability does depend, were in writing, and no copies of those contracts were brought upon the record.

The rule is inconsistent with the laws, because it violates the rule governing the burden of proof and throws upon defendant the burden of proving a negative.

The rule gives to defendant's traverse of the allegations of the declaration the same effect which the law gives to his confession of them.

The rule is inconsistent with the whole course of the legislative history of the District and inconsistent with the whole course of its judicial history as made and recorded by this court (Plaintiff's Brief, pp. 14 *et seq.*).

The rule is inconsistent with the laws, because it is the exercise of legislative powers by the judicial department.

The authority of the District supreme court to establish rules "*not inconsistent with the laws of the United States*" does not authorize it to disestablish the course of law established by those laws, but only to establish rules consistent with the course of law established by the laws. The authority of this court to make equity and admiralty rules has never been treated as authority to new-model the established course of law in courts of equity and admiralty, but only as power to make rules consistent with the ancient course of law in those courts. But in no sense is the seventy-third rule a rule to carry into effect the established course of law; on the contrary, it substitutes an entirely different course of law, which "rather resembles a bill of discovery in equity than a pleading at common law," the effect of which is to "deprive a party under certain conditions of his right to a trial by jury in the regular mode of the common law" (Plaintiff's Brief, pp. 13, 14). The new course of law inaugurated by the rule confers upon plaintiff, in addition to his rights under both common-law and chancery procedure, rights which he did not have under either of those systems, and denies to defendant the protection of either system or any other protection when sued under the circumstances of this case. Always defendant's rights under the laws are subordinated to plaintiff's rights under the rule.

The relative positions assigned to plaintiff and defendant under the rule is indicated by the statement of the court of its purpose in making the rule: "This seventy-third rule was adopted mainly to facilitate the collection of honest debts, and *in favor of the creditor*" (Plaintiff's Brief, p. 13). Thus the rule prejudges the case, and, by reason of so prejudging it, treats the plaintiff as a "creditor," and his demands as "honest debts," and treats the defendant as a debtor who seeks to abuse the processes of the court to

hinder and delay the "creditor" in the collection of his "honest debts," although defendant pray only to be permitted to exercise his rights under the laws.

If it were true, as contended, that the rule exacts no more of defendant than is exacted of him in chancery, the rule would be less open to objection on principle, but not the less open to the objection that it is inconsistent with the laws. But more is exacted of defendant under the rule than is exacted of him in chancery, for the affidavit of defense in this case would have been sufficient as an answer in equity to prevent the bill from being taken *pro confesso*, and to put the complainant to proof, under the principle that: "If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing" (6 Cranch, 51; 7 Wall., 205; Plaintiff's Brief, p. 49).

The contention that to accept the affidavit of defense in this case as sufficient to put plaintiff to proof would enable defendant to evade the rule and impair plaintiff's rights thereunder prevailed over the counter-contention that to reject the affidavit would enable plaintiff to evade the laws and impair defendant's rights thereunder.

Defendant says that the plaintiff in error "practically says he has no defense. He says he has not sufficient information to deny the plaintiff's declaration or affidavit under oath" (Defendant's Brief, p. 10). That is not a correct statement of the case. The correct statement is this:

Plaintiff says, "You owe me $536.06, with interest, for materials sold Vinson; pay."

Defendant answers, "I do not know whether your claim is, or is not, just; prove it and I will pay."

Plaintiff replies, "I have already proved it by my *ex parte* affidavit."

Defendant rejoins, "I am not satisfied with that mode of proof; prove it in the manner provided by law; I claim the protection of the Constitution and laws of the United States."

The 73d rule then pronounces judgment:

"Defendant, you seek to abuse the processes of the court to 'vex and delay' plaintiff in the collection of his 'honest debts,' therefore, I enter judgment against you for amount claimed."

The favor shown plaintiff by this rule made "in favor of the creditor" is further evidenced by the allowance in this case of interest from the alleged date of the *delivery* of the materials, although the declaration alleges that they were sold payable on *demand*, and there is in the record neither *allegata* or *probata* of the date of the *demand*.

The court below says, without show of principle or authority:

"Having voluntarily entered into the obligation, he (the surety) takes it with its burdens, one of which is that he is charged with the knowledge of his principal. Consequently, *he must deny the justice of the demand under oath, or become liable, like his principal, to the summary judgment*" (Rec., p. 15).

Thus the rule deprives the surety of his right under the laws to demand proof of the forfeiture of the bond.

The court below says:

"For the purposes of recovery it was sufficient to *say*, as was done, that plaintiff agreed to furnish certain materials * * * that he did furnish the same * * *" (Rec., p. 15).

In other words, under the rule *allegata* is accepted as *probata*; but under the law, it is not sufficient to "*say*," it is necessary to *prove*.

In order to understand the rule, its requirements, and operation, it is necessary to ascertain what function is performed by the affidavit in support of the declaration, and by that in support of the plea. Little can be learned of the practice from the theory. Sometimes it is said that they are a part of the pleadings, sometimes they are treated as

evidence addressed to the court, sometimes it is said that they are neither, and sometimes they are treated as both.

Washington Times Co. *v.* Wilder, 12 App. D. C. (Plaintiff's brief, p. 38), illustrates the function performed by the affidavit of defense and what is necessary to constitute a sufficient affidavit of defense, as the rule is sometimes applied. That was a suit against a corporation as the maker of two notes. In affirming summary judgment against defendant under the rule, the Court of Appeals said:

"The defendant pleaded, in several forms, that it was never indebted; that it never promised; that it never assumed, as alleged. With these pleas was filed an affidavit made by Joseph K. Potter, the secretary of the defendant corporation; and in which affidavit the affiant states that he, as such secretary, has had the possession of all the books and papers of the corporation; that S. M. Goldsmith, whose name is signed to the notes, after that of the defendant company, as manager, never was the manager of the company and was never given authority by the corporation to sign any notes to be executed on its behalf; and that if said notes were executed by him they were so executed without the prior authority of the stockholders or of the board of directors of the company, or by any other person or persons having the power to delegate or entrust such authority to him; that the execution and delivery of said notes by said Goldsmith, if they were so executed and delivered, has never been ratified by the corporation, or by its board of directors, or by any person having authority to so ratify the same; that at the time of the execution of said notes, and for an entire year previous thereto, and subsequent thereto, up to December 12, 1896, the manager of the company was Charles G. Conn, and not S. M. Goldsmith. * * * The affidavit has more of the characteristics of a special plea than an affidavit required to disclose fully the grounds of a complete legal defense and the facts upon which it may be maintained. It is more remarkable for the facts that it withholds than for the facts it discloses; * * * that Conn did fully sanction and approve the making and delivery of the notes to the plaintiff is *made manifest* by the fact that he himself endorsed the notes to give them additional security. Under the facts disclosed, we may reasonably *assume* that the notes were made and de-

livered to the plaintiff by the direction and procurement of Conn, the president and general manager of the defendant. * * * There is, therefore, no *justice*, no *equity*, set up as a defense. * * * The fact that the president and general manager of the company was a party to the transaction of making and passing the notes, is clear *proof* to charge the company with knowledge that its debt due to the plaintiff had assumed the form of promissory notes."

Trial by jury is not "preserved" when summary judgment is entered against defendant upon what the court "may reasonably *assume*" in regard to facts put in issue by the pleadings.

The law of the District is laid down by its court of last resort thus:

"It presents evidence from which a jury might be justified in finding possession; evidence from which possession may be inferred; but *the court cannot infer*" (8 Pet., 218).

"It is a point too well settled to be now drawn in question, that the effect and sufficiency of the evidence are for the consideration and determination of the jury. And this proceeds upon this obvious principle. *It is the province of the jury to decide what facts are proven.* It is competent to them to draw from the evidence before them, all such inferences and conclusions as that evidence conduces to prove. If the court were to tell them that upon a given state of evidence the plaintiff could or could not recover, then they must in the assumption of what facts were proven, either discard from their consideration such inferences as the jury might draw, or they must themselves deduce them. The former course would injure the party offering the evidence; the second would be an usurpation of the office of the jury. *The only case in which the court can make such inferences, and pass upon the sufficiency of the evidence, is by a demurrer to evidence*" (14 Pet., 31; 134 U. S., 398).

If a court of law cannot "infer" the facts, may it "assume" them?

The Times Company's affidavit was held to be "insufficient." Insufficient as *what?* As a pleading? Or evidence?

Or both? Or of that nondescript, an affidavit of defense under the 73d rule? Where are the principles to be found for determining its sufficiency? Not in the common law or in the statutes, for it is no part of those laws; the common law rejected it, and our statutes have never adopted it. If in the decisions of State courts under State laws, as suggested, which of the various affidavit of defense systems shall be selected as furnishing the test? Is it permissible to make up a composite system which shall confer upon plaintiff the advantages of all systems and deny to defendant the protection of any?

The new procedure under the rule in the trial court would necessitate a new procedure in this court, upon writ of error. Under the present procedure this court could pass upon the sufficiency of the pleadings, but not upon the sufficiency of the evidence. Could it pass upon the sufficiency of that hybrid, an affidavit of defense under the 73d rule, as applied in the Times Company's case? Under the present practice this court cannot "infer;" could it "assume" under the new practice? Under what law would this new crop of questions be decided? Would the judgments of the court of last resort vary with the rule books of inferior courts?

The apology for the rule is that it is "salutary." If it were valid and properly limited in its application it might be so, but under no circumstances could it be salutary as enforced in this case. Of a system that works out the result in this case there can nothing defensive be said. But the question is not whether it is salutary, but whether it is consistent with the laws.

The rule is based upon the fallacy that want of authority in the court to deprive defendant of the protection of either the statutory mode of proof or of the constitutional form of trial separately is supplied by depriving him of both together.

Defendant's unconditional rights under the laws are sub-

jected by the rule to conditions unknown to the common law and not imposed by the statutes, and when he is unable to perform the conditions he is deprived of the right. Conditions impossible of performance are prohibitions. Rights that can be exercised only upon the condition precedent of performing conditions impossible of performance are not "preserved."

That the conditions may be possible of performance in some cases does not obviate the objection that they are impossible in other cases. That the rule may not deprive defendant of his rights in some cases does not obviate the objection that it does deprive him of his rights in other cases. That justice may be done under the rule in some cases does not obviate the objection that in other cases injustice is perpetrated under it. Rights of defendant under the laws cannot rightfully be impaired by a rule of court in order to relieve plaintiff from burdens imposed upon him by law.

To render judgment against defendant without judicially ascertaining and determining whether the demand is just or unjust is only one degree less unjust than to render judgment against him for a demand known to be unjust.

It was doubted by the United States circuit court whether the affidavit of defense system of Georgia, established by the State constitution and limited to "unconditional contracts in writing," was enforcible in the Federal court (47 Fed. Rep., 559; Plaintiff's Brief, p. 23); but it has been repeatedly held, upon the authority of *Ex parte* Fisk, 113 U. S. (cases cited on Plaintiff's Brief, pp. 23, 24), that State statutes which enforce discovery in advance of trial (in cases not authorized by the Federal statutes) from defendant at law, whether by personal examination of defendant or by interrogatories addressed to him, or, like the 73d rule, by proceedings in the nature of a bill of discovery, were inconsistent with the Federal statutes regulating the subject of evidence and discovery, and therefore unenforcible in the Federal courts; but the inconsist-

ency between those State statutes and the Federal statutes is much less than that between the rule and the Federal statutes, for the enforcement of the State statutes was sought in the Federal courts *in aid* of the statutory mode of proof, while the discovery enforced by the 73d rule is *substituted* for the statutory mode of proof and trial by the court for trial by jury.

The condition imposed by Congress upon the exercise of the right of trial by jury in criminal cases in prosecutions instituted in the police court of the District was declared void for reasons applicable to the conditions imposed by the rule (Callan *v.* Wilson, 127 U. S., 540).

The condition imposed by Congress upon the exercise of the right of trial by jury in civil cases in suits instituted before justices of the peace in the District was sustained for reasons not applicable to the conditions imposed by the rule (Capital Traction Co. *v.* Hof, 174 U. S., 1).

Just as gradual enlargement of the jurisdiction of the justices of the peace made the denial of trial by jury (under the construction placed upon the statutes by the lower courts) more onerous, so the gradual enlargement of the scope of the 73d rule and the more rigorous enforcement of its requirements against defendant has made the denial of trial by jury under the rule more onerous. Under the construction placed upon the rule in this case defendant is stripped of the last vestige of the protection provided him by the laws. But that is not the greatest evil. It is no longer a mere question of deprivation of defendant's rights under the laws. The injustice of the rule, and the inconsistency between it and the laws lie less in its depriving defendant of all the protection provided him by the laws, the common law, the statutes, and the Constitution, than in its depriving him of that protection *without providing him with any other protection*. The laws provided defendant with means for his protection at every stage of the proceedings; the rule as applied in this case denies him protection at any stage of

the proceedings and delivers him defenseless to the *ex parte* affidavit of his adversary.

The court which made the rule entertained this opinion of its validity:

"The only doubt we entertained was as to our power to make it. It was matter of serious misgiving to some of the members of the court whether it was not a species of legislation, and whether it was not a denial of the citizens' rights under the Constitution. It certainly looked very much like the exercise of legislative rather than judicial power" (MacArthur & Mackey, 199; Plaintiff's Brief, p. 30).

The court which reaffirmed its validity described it as "the rule depriving a party under certain conditions of his right to a trial by jury in the regular mode of the common law" (5 App. D. C., 5; Plaintiff's Brief, p. 14).

Cited to the bar of this court to show its authority for "depriving a party under certain conditions of his right to a trial by jury in the regular mode of the common law," the rule shows no authority in the laws of the United States, but claims to have discovered in other laws both the authority and proof that it is consistent with the laws of the United States.

The method of determining what is consistent with the laws of the District by what is consistent with other laws by means of variant rules of decision under which the conclusion reached is dependent upon the rule of decision selected to reach the conclusion, has resulted in adopting and upholding the rule, and the whole system of which it is a part, in destroying symmetry in our laws, in making them so uncertain that half the judgments of our intermediate appellate court reviewed by this court have been reversed, and in wringing from us the cry: *Misera est servitus ubi jus est vaga aut incerta.*

The methods by which it has been shown that the rule is consistent with the laws are the approved methods,

and the rule itself the approved standard of such consistency.

The laws of the United States and their exposition by this court alike disregarded to follow decisions of other courts under other laws.

The rule is typical of all. If the rule is well, all is well.

After prior admonitions this court expressed its strong disapproval of determining what is law here by what is law elsewhere, and of treating the decisions under the laws applicable to the District as overruled by decisions under laws not applicable to the District, and declared that the law of the District must be enforced in the District (181 U. S., 384; 167 U. S., 573; 14 App. D. C., 509; same case, 180 U. S., 59; 169 U. S., 302).

Respectfully,

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